

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

v.

No. CV 13-0449 JH/LAM
CR 10-3366 JH

MARK ALFONSO ORTIZ,

Defendant/Movant.

**ORDER ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS
AND RECOMMENDED DISPOSITION**

THIS MATTER is before the Court on Magistrate Judge Lourdes A. Martínez' *Proposed Findings and Recommended Disposition* [Doc.7] (hereinafter "PF&RD"), filed on October 1, 2013. Objections to the proposed findings and recommended disposition were due by October 18, 2013. On November 4, 2013, Defendant/Movant filed a *Motion in Opposition of Magistrate[']s Recommendation* [Doc. 8], stating that he received a copy of the PF&RD on October 29, 2013, and that he had not received a copy of the United States' response to his Section 2255 motion. In this motion, Defendant/Movant asks the Court to strike the PF&RD, order the United States to serve a copy of its response to Defendant/Movant Section 2255 motion on Defendant/Movant, and allow Defendant/Movant time to respond to the United States' response. [Doc. 8 at 1-2]. On November 5, 2013, the United States filed a response to Defendant/Movant's instant motion, stating that it sent copies of its responses to Defendant/Movant's Section 2255 motion and motion for appointment of counsel to Defendant/Movant's address of record by certified mail on June 5, 2013, and the United States attached copies of the certified mail receipts and tracking information. [Doc. 9] and [Doc. 9-1]. The attached receipt shows that the mail was delivered to Defendant/Movant's address on

June 10, 2013. [Doc. 9-1 at 2]. The United States further states that it will again mail to Defendant/Movant copies of its responses to Defendant/Movant's motions. [Doc. 9 at 2].

The Court finds that Defendant/Movant's Motion in Opposition of Magistrate[']s Recommendation [Doc. 8] is without merit. Not only has the United States provided evidence that its responses were sent to Defendant/Movant at his address of record, the Court's docket also shows that copies of the United States' responses to Defendant/Movant's Section 2255 motion and motion for appointment of counsel were mailed by the Court to Defendant/Movant at his address of record on June 5, 2013. [Docs. 5 and 6, respectively]. The Court's docket also shows that a copy of the PF&RD was mailed to Defendant/Movant's address of record on October 1, 2013. [Doc. 7]. Defendant/Movant provides no evidence or explanation to support his claim that he did not receive a copy of the United States' response or his claim that he received the PF&RD 28 days after it was mailed to him. A letter duly mailed is presumed to have been received. *See Dean Witter Reynolds Inc. v. Variable Annuity Life Ins. Co.*, 373 F.3d 1100, 1109 (10th Cir. 2004) (citing *Witt v. Roadway Express*, 136 F.3d 1424, 1429-30 (10th Cir.1998)) (“[a] properly addressed piece of mail creates a rebuttable presumption of receipt . . . when placed in the care of the postal service”). The Court finds that Defendant/Movant has failed to rebut the presumption that he received these documents. Accordingly, Defendant/Movant's Motion in Opposition of Magistrate[']s Recommendation [Doc. 8] should be denied.

In addition, no party has filed objections to the proposed findings and recommended disposition and the deadline for filing objections has passed. The Court has determined that it will adopt the ***Proposed Findings and Recommended Disposition*** [Doc. 7], deny Defendant/Movant's Section 2255 Motion [Doc. 1], Motion for Appointment of Counsel [Doc.


4], and Motion in Opposition of Magistrate[']s Recommendation [Doc. 8], and dismiss this case with prejudice.

IT IS THEREFORE ORDERED that the *Proposed Findings and Recommended Disposition* [Doc. 7] are **ADOPTED** by the Court.

IT IS FURTHER ORDERED that Defendant/Movant's Section 2255 Motion [Doc. 1], Motion for Appointment of Counsel [Doc. 4], and Motion in Opposition of Magistrate[']s Recommendation [Doc. 8] are **DENIED**.

IT IS FURTHER ORDERED that this case be **DISMISSED WITH PREJUDICE** and that a final judgment be entered concurrently with this order.

IT IS SO ORDERED.



HONORABLE JUDITH C. HERRERA
UNITED STATES DISTRICT JUDGE